

December 15. 1768.

A N S W E R S

F O R

Katharine Brownlee, only child now in life procreated between John Brownlee flesher in Strathaven and the now deceased Helen Hepburn, and for Alexander Park shoemaker in Strathaven, husband to the said Katharine Brownlee, for his interest,

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The PETITION of the said John Brownlee flesher in Strathaven.

THE respondent Katharine Brownlee was extremely sorry to find herself under the disagreeable necessity of entering into a litigation with her father in a court of law, which nothing could have compelled her to do but a sense of the duty she owes to her own family, to whom she may well be allowed to bear a stronger affection than to the children of her father by his second marriage; with a view to whose benefit alone she can ascribe the obstinate opposition which has been made to her demand.

The nature of the deed upon which the question between the parties turned, is fairly stated in the petition; it is therefore unnecessary to trouble your Lordships with a repetition of any of the clauses thereof. But before proceeding to consider either the competency of this petition, or the relevancy of the arguments therein contained, the respondent must beg leave to take notice of some allegiances which seem to have

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been thrown out with a view to create a prepossession against her, and to place her plea in an unfavourable light.

The petitioner is, in the *first* place, pleased to observe, That he got only 750 merks of tocher with her mother; and on that account seems to think, that the obligations he undertook in his contract of marriage should not be so strictly pushed against him. But however he may now chuse to represent these matters, the real case is, that at the time of his first marriage, he was a young man possessed of little fortune; that it was with difficulty his wife's father was prevailed on to consent to the marriage; and that the means which he thereafter acquired to a very considerable amount, were in a great measure owing to the prudence and good management of the respondent's mother.

The petitioner *next* complains of the respondent, for having run away with an indolent shoemaker. But this is by no means true. Her husband, who is her own cousin, is not only well employed and industrious in the way of his business, but is likewise proprietor of subjects in the town of Strathaven to a considerable extent; and instead of running away with him, she was regularly proclaimed in the church, and married him, with the consent and approbation of all her relations, the petitioner alone excepted, who only opposed the match because she and her now husband would not agree to discharge him of the obligations he had come under in his contract of marriage with her mother, upon his making payment of 800 merks, for which he said at that time he could get another husband for her.

These things being premised, the respondent now proceeds to a more particular consideration of the merits of the questions that fall to be determined by your Lordships.

The petitioner, in the *first* place, complains of the Lord Ordinary's interlocutors, whereby he has been appointed to execute a disposition of the subjects particularly mentioned in his contract of marriage with his first wife, in favour of himself and the respondent *nominatim*, as heir of the marriage; whom

whom failing, to his own nearest heirs or assignees whatsoever ; with a reservation to himself of the whole powers and faculties provided to him by the said contract ; and particularly, that of providing his wife and children of any subsequent marriage in competent portions, not exceeding in the whole the sum of 400 merks Scots.

But upon this head the respondent begs leave in the *first* place to contend, That the petitioner is foreclosed, by an extracted decree, from bringing these interlocutors under your Lordships review in the form of a reclaiming petition. The Lord Ordinary's first interlocutor was pronounced upon the 24th of June last : and this interlocutor, so far as regards the point now under consideration, was adhered to upon the 6th of August thereafter, upon advising a representation for the petitioner, and answers for the respondent. This being the case, the decree of the court pronounced in these interlocutors became so far final, in three days after its being entered in the minute-book, as to intitle the respondent to insist for an extract in terms of the act of sederunt of the 6th of February 1748. And as it was accordingly put up in the minute-book upon the same 6th of August, it is undeniable, that it might have been legally extracted as early as the 10th of that month. The respondent, however, was not so very precipitate as she might have been, she allowed the session to expire before taking that step. But as during that period no application was made upon the part of the petitioner, to keep matters open, she was at full liberty to extract the decret during the vacation : and having accordingly done so, the cause, so far as concerns the point now under consideration, was removed out of court, and it thereafter remained no longer competent to bring the matter under review, either by a representation to the Lord Ordinary, or by a petition to your Lordships. If therefore the petitioner thinks he has suffered any hardship by being deprived of laying his case before your Lordships in the form of a petition, he has his own agent only to blame, in not giving the necessary attention to
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the forms of the court, from which he might have learned, that without applying for a review of the Lord Ordinary's interlocutors, during the currency of the last session, the respondent was at full liberty to extract the partial decree pronounced in her favour.

The petitioner indeed contends, That the proof allowed by the Lord Ordinary's second interlocutor of the 6th of August, must have imported a virtual stop of extracting the decreet pronounced upon the 24th of June, and adhered to upon the said 6th of August, until the proof came to be reported and advised. But the respondent does, with all submission, apprehend, that this plea is no wise founded, either in the ordinary principles of judicial procedure, or in the particular forms of the court; but is, on the contrary, manifestly adverse to both. The proof allowed by the Lord Ordinary related solely to the conquest, which was a separate and distinct subject from the lands, which the petitioner was decerned to dispoise to the respondent, as heir of the marriage, in terms of the contract libelled on. And as that proof could no wise affect the other question, with regard to these lands, it is impossible that the allowing that proof could have the smallest effect to prevent the respondent from extracting the decree she had obtained with regard to them, or even to carry it into execution by the force of legal diligence. Nothing is more common, than to see one and the same interlocutor decerning a defender to make payment of one part of a sum of money libelled as due by him, and allowing a proof as necessary for determining questions that have arisen with regard to another part of the sum so libelled; but it has never hitherto been supposed, that the granting such proof could for one moment prevent the partial decree pronounced against him from being extracted.

This being the case, the respondent submits it to your Lordships, that the extract in question is perfectly regular; and if she is right in this particular, it must unavoidably follow, that the petition is altogether incompetent. The petitioner
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indeed would have it believed, that his doer had been lulled asleep by the respondent's agent, and that it was understood between them, that it was altogether unnecessary for him to reclaim until the beginning of the winter-session. But for this alledgeance there is no foundation whatever. It is equally destitute of truth with the alledgeance made in the second protest taken for the petitioner, *viz.* That the Lord Ordinary's last interlocutor was only signed upon the 9th of August, and that it was not put up in the minute-book upon the 6th of that month; the contrary whereof appears from the record of court.

Nor will either of the protests taken upon the part of the petitioner have any influence with your Lordships. The respondent's agent would have been much to blame, if he had delayed the extracting his act and commission for proving the extent of the conquest, merely because the petitioner's agent was pleased to intimate to him, that he had neglected to reclaim against the Lord Ordinary's interlocutor during the last session; and that he considered it to be premature to allow a proof, until the respondent had given in a condescendence, especially as sundry of the witnesses to be adduced were old and infirm. And there is as little ground to blame him for taking out at the same time an extract of the decree pronounced with regard to the disposition appointed to be granted by the petitioner, which he could then obtain, without any additional expence to his clients, it being necessary at any rate, in extracting the act and commission, to narrate the whole procedure from the beginning of the cause. It surely is no sufficient reason for delaying an extract, to be told, that in case it is not immediately taken out, the judgement pronounced by an Ordinary is to be brought under review; the unavoidable consequence whereof must be, to create an additional expence, even though the judgement should be approved of. In short, as it cannot be said that the extract in question is in any shape irregular or unwarrantable, it is humbly thought that it cannot be recalled; and of consequence the

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question betwixt the parties, so far as concerns the lands specially mentioned in the contract of marriage, must be considered as totally removed out of court. Indeed the petitioner seems once to have been of this opinion; for he preferred a bill of suspension of the aforesaid decret, upon which he obtained a sist on the 14th of November last: but this suspension he thought proper afterwards to keep up, without so much as informing your Lordships of it in his petition.

But even supposing the petition to be competent as to this question, the respondent hopes to satisfy your Lordships, that the petitioner has no just ground to complain of the judgement pronounced by the Lord Ordinary.

The substance of the arguments urged for the petitioner at considerable length upon this head, is, That as by the terms of the contract he only became bound to resign the subjects therein specially mentioned in favour and for new infestment to himself, and to the heirs of the marriage, whom failing, to his own nearest heirs and assignees whatsoever, he is by no means bound to execute a disposition of these subjects in the respondent's favour: That there is a material and well-founded distinction between those obligations in contracts of marriage which merely import a destination of the succession, and those which contain an express obligation to pay or secure to the children of the marriage certain sums against a certain fixed time: That in the first case the children have only a hope of succession; which may be disappointed by any rational or onerous deed of the father, and cannot better themselves by even using an inhibition on the contract; but that, in the other case, the children fall to be considered as real creditors of the father, and may, by inhibition served upon the contract, be effectually secured against posterior contractions: That on obligations of the first kind no action can be sustained against the father during his life; for that as the children are only called as heirs of the marriage, they can only insist in that character after their father's death, when they may have a right to reduce and set aside any gratuitous disposition which he may have made to disappoint
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their succession ; and that therefore the respondent cannot insist against her father to grant a disposition in her favour during his life.

The respondent must, however, acknowledge, that she is somewhat at a loss to follow the petitioner in this argument. She knows very well that there is a distinction betwixt provisions to children which only create a personal obligation upon the father, and those which give them a real lien upon his subjects ; and that in the first case all the father's onerous contractions will strike against them, unless they are conceived in such terms, as that the children, upon their existence, shall become proper creditors. She is likewise sensible, that there is a distinction betwixt such obligations as merely import a destination of the succession, and those whereby the father becomes bound to secure the succession : and that in the one case they must take it up at the father's death, *tantum et tale* as it is ; whereas in the other they may, even during their father's life, insist to have the obligation made effectual. But then it is as clear as sunshine, that the obligation undertaken by the petitioner was of the latter, not of the former kind ; for he not only became bound to resign the particular subjects therein mentioned, for new investment to himself, and the heirs to be procreated of the marriage, but likewise restricted his own powers over these subjects to the faculty of burdening them with a provision to a second wife and children, in a sum not exceeding 400 merks. By this obligation he became bound to put it out of his power to affect these subjects, even by his rational deeds. The respondent is therefore a creditor in the fullest sense of the word, and is well intitled to insist for being secured against her father's deeds, by a disposition to her as heir of the marriage, with a reservation of his own liferent, and of the faculty to burden to the extent of 400 merks Scots : And it is impossible that the petitioner can refuse so just a demand, but in the view of disappointing her altogether ; which he would probably very soon attempt,
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were it to be found that he had fulfilled the obligation contained in this part of the contract, by the procuratory of resignation therein contained. It is plain and obvious, that the meaning of the contract was, to secure the heirs of the marriage in the possession of the lands thereby provided to them: And that being the case, the petitioner must be bound to grant every deed that is necessary for the respondent's security, and cannot pretend to shelter himself under the pretence of having fulfilled the strict literal sense of the words in which the clause of provision is expressed.

The petitioner further insists, That at any rate he cannot be bound to execute a disposition to the respondent *nominatim*, but only to the heirs of the marriage in general: for that supposing the respondent should die before him, the nearest of kin might then insist for re-implementing the obligation.

But this is a most strange conceit. The marriage being dissolved, it is clear that the respondent is the heir of that marriage, and that there can be no other heir of it. And the decisions mentioned by the petitioner can have no effect. For in the first case, *viz.* Panton against Irvine, there was only an obligation to provide a sum to the heirs of the marriage, which would be liable to the father's debts: And in the other case, mentioned by Fountainhall, the clause founded on was a mere destination of succession, subject to all the father's onerous and rational deeds: But in the present case, the petitioner reserved only to himself a faculty to burden to the extent of a certain sum, for a certain purpose; and on that account the respondent is intitled to insist for security against any other deeds to be granted by him. Nor can the petitioner object to this, because the nearest of kin, upon her death, might insist for a new disposition. This will be effectually prevented by his executing a disposition to the respondent *nominatim*; whom failing, to the heirs of her body; whom failing, to his own nearest heirs and assigns whatsoever. And as the heirs of her body will be effectually secured, so, upon failure of them before the petitioner's death,
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he may convey the subjects to whom he thinks proper : But it would be highly unjust to allow him to retain power over these subjects, so as to enable him to defeat the obligation in the contract of marriage, by which he agreed to give up, in favour of the heirs of the marriage, every power over them, except a faculty to burden them to the extent of 400 merks.

The petitioner indeed endeavours to put another construction upon this reserved faculty ; and insists, That thereby he has a power to burden the subjects with a sum not exceeding 400 merks, to his wife, and to each of the children of the second marriage. But it is only necessary to attend to the words, in order to show, that they cannot bear any such meaning.

The second ground of complaint made by the petitioner, relates to the conquest acquired during the standing of the first marriage : With regard to which he not only insists, That the respondent cannot be intitled, during his life, to demand a conveyance to the heritable subjects, which make part of that conquest ; but also further contends, that she ought not even to be allowed to ascertain its extent by a proof.

With regard to these points, your Lordships will be informed, that although the Lord Ordinary, by his first interlocutor, appointed the petitioner to convey the whole subjects acquired by him during the standing of his first marriage, as well as the lands particularly provided to the heirs of the marriage in the contract, the respondent readily agreed to his being intitled to burden the said conquest *subsidiariè*, in the event of his other funds being insufficient for that purpose, so as to enable him to make adequate and rational provisions to the wife and children of his second marriage. But by this agreement she never meant to depart from her right to insist, that the heritable subjects acquired by him should be immediately secured to her, and the heirs of her body, by a regular conveyance. And she submits it to your Lordships, if the very arguments urged in the petition

do not afford a sufficient reason for her insisting upon such security. The petitioner contends, That a clause of conquest is a mere destination of succession; and that a father cannot be thereby debarred from contracting debt, providing other children, or doing any reasonable act of administration whatever. The respondent, however, cannot help thinking, that this is by no means a just construction of the meaning of the clause of conquest in question. By that clause it was intended to secure the heirs of the marriage in all lands and heritages, &c. which should be acquired during the standing of the marriage: and although the respondent, upon her succession to such subjects, may be liable *subsidiariè* in payment of her father's just and lawful debts, or even in performance of rational and suitable provisions to the wife and children of the second marriage; yet still she apprehends, that she has a right to insist, that as these subjects are expressly provided to her, she is intitled to have them immediately conveyed to her, under the reservation of her father's liferent, in order to prevent his endeavouring, by sinister methods, to defraud her of this part of the succession provided to her in her mother's contract of marriage. The petitioner is indeed pleased to contend, That conquest is considered as an *universitas*, which a father may increase or diminish as he pleases; and that as the children have only a right to the *universitas* in general, not to any particular subject of it, they cannot claim it, or even insist for liquidation of it, during the father's life. But this is a doctrine to which the respondent can by no means agree. It may indeed, perhaps, with some degree of propriety, be considered as an *universitas* during the standing of the marriage. It may be admitted, that during that period a father is not expressly bound to retain every subject acquired by him, in the same shape in which it is acquired; but from the moment of the dissolution of the marriage, the children to whom it is provided, may well be said to have a *jus quesitum* in every particular subject of which it is composed; and that although the father may burden these subjects with
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onerous contractions, yet he cannot pretend to diminish them in any other way, or even to transmute their shape.

But whatever shall be your Lordships opinion with regard to this point, the respondent is advised, that she was undoubtedly intitled to demand a proof for liquidating and ascertaining what was the amount of the conquest at the dissolution of the marriage, in order to fix to what extent she will fall to be considered as creditor to her father upon his death, in consequence of the provision of such conquest made to the heirs of the marriage; which, were it to be delayed till the succession opens to her, might perhaps be extremely difficult, if not altogether impracticable; and would at least, in all probability, involve her in a litigation with the children of the second marriage, or others, to whom the petitioner may think proper to grant conveyances of his effects, which she is very desirous to avoid.

The respondent thinks it unnecessary to use any argument upon this last point; and shall only further observe, that as the act and commission was extracted, and the whole witnesses intended to be called by the respondent, have already been examined, the petitioner himself excepted, whom she proposes to adduce as a haver, he comes now too late to insist that no proof shall be allowed.

Upon the whole, The respondent is hopeful, that your Lordships will have no difficulty of refusing the petition. The conduct of the petitioner shows, that he is desirous to do every thing in his power to evacuate the provisions conceived in her favour; but she is satisfied, that the justice of the court would discountenance every scheme of that kind, even though it were still competent for the petitioner to insist in the defences he maintained before the Lord Ordinary; which, in respect of the extracted decree, and act and commission so far execute, he cannot now be heard upon in the form of a reclaiming petition.

In respect whereof, &c.

ALEX. WIGHT.



